

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DANIEL KOGAN and CHRISTOPHER  
HEWITT, individually and as the representative  
of all persons similarly situated,

Plaintiffs,

v.

ALLSTATE FIRE AND CASUALTY  
INSURANCE CO.,

Defendant.

**NO. 3:15CV05559-BHS**

**DEFENDANT'S NOTICE OF  
SUPPLEMENTAL AUTHORITY IN  
OPPOSITION TO PLAINTIFFS'  
MOTION TO REMAND**

Defendant submits the following recent case law and pleadings, attached hereto as Group Exhibit A, created after the briefing on Plaintiffs' Motion to Remand was submitted, as supplemental authority in support of Defendant's opposition to Plaintiffs' remand motion.

In Defendant's opposition to Plaintiff's remand motion, Defendant cited *Dawsey v. Travelers Indem. Co.*, No. 15cv5188-RBL, Doc. 31 (W.D. Wash. July 16, 2015), and *Lewis v. Hartford Cas. Ins. Co.*, No. 15-cv-05275-RBL, Doc. 26 (W.D. Wash. July 20, 2015), both substantively similar diminished value lawsuits brought by the same Plaintiffs' counsel, for the proposition that a class plaintiff cannot defeat CAFA jurisdiction by pleading gamesmanship. (See Defendant's Remand Opposition, Doc. 16, at p. 16.) In *Dawsey* and *Lewis*, the gamesmanship was purporting to disclaim treble damages despite asserting a CPA claim, whereas here, the gamesmanship is not seeking *Olympic Steamship* fees even though they are

1 available, with the result that attorneys' fees would be taken out of any class recovery, rather  
 2 than being in addition to such recovery.

3 In *Dawsey* and *Lewis*, Judge Leighton rejected Plaintiffs' counsel's tactics and included  
 4 the CPA treble damages in the amount in controversy. And just last Friday, the Ninth Circuit  
 5 refused to review these orders. *See Lewis v. Hartford Cas. Ins. Co.*, No. 15-80130, Doc. 6 (9th  
 6 Cir. Oct. 23, 2015); *Dawsey v. Travelers Indem. Co.*, No. 15-80128, Doc. 9 (9th Cir. Oct. 23,  
 7 2015) (included in Group Exhibit A).

8 Moreover, immediately after the Ninth Circuit's rulings in *Lewis* and *Dawsey*,  
 9 Plaintiffs' counsel filed amended complaints in those cases seeking the very treble damages  
 10 they previously sought to disclaim. (*Lewis* Amended Complaint, Doc. 31, ¶¶ 6.9, 7.1; *Dawsey*  
 11 Amended Complaint, Doc. 35, ¶¶ 6.9 7.1, included in Group Exhibit A.) The amended  
 12 complaints in *Lewis* and *Dawsey* show beyond doubt that Plaintiffs' counsel are attempting to  
 13 avoid, through artful pleading, rightful CAFA jurisdiction in all these diminished value cases.  
 14 That attempt should be soundly rejected by this Court, and Plaintiffs' remand motion should be  
 15 denied.

16 DATED this 28th day of October, 2015.

17 COZEN O'CONNOR

18 By: /s/Jodi A. McDougall  
 19 Jodi A. McDougall, WSBA No. 22060  
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Attorneys for Defendant

**CERTIFICATE OF SERVICE**

I, Jodi McDougall, certify and state as follows:

I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Cozen O'Connor, 999 Third Avenue, Suite 1900, Seattle, WA 98104.

On the 28th day of October, 2015, I electronically filed the foregoing **DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record. I also caused the foregoing **DEFENDANT'S NOTICE OF SUPPLEMENTAL AUTHORITY IN OPPOSITION TO PLAINTIFFS' MOTION TO REMAND** to be served upon counsel of record at the address and in the manner described below:

Stephen M. Hansen  
Law Offices of Stephen M. Hansen, P.S.  
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E-mail: [steve@stephenmhansenlaw.com](mailto:steve@stephenmhansenlaw.com)

☐ U.S. Mail  
☒ Email  
☐ Overnight Courier  
☐ Facsimile  
☐ Legal Messenger

I hereby declare under oath and under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

DATED this 28th day of October, 2015.

/s/Jodi A. McDougall  
Jodi A. McDougall, WSBA No. 22060

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# GROUP EXHIBIT A

FILED

UNITED STATES COURT OF APPEALS

OCT 23 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DANIEL DAWSEY, individually and as  
the representative of all persons similarly  
situated,

Plaintiff - Petitioner,

v.

THE TRAVELERS INDEMNITY  
COMPANY,

Defendant - Respondent.

No. 15-80128

D.C. No. 3:15-cv-05188-RBL  
Western District of Washington,  
Tacoma

ORDER

Before: GOULD and WATFORD, Circuit Judges.

Respondent's request to take judicial notice of the state court filings is  
granted.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is  
denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir.  
2010) (per curiam).

SL/MOATT

FILED

UNITED STATES COURT OF APPEALS

OCT 23 2015

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOHN LEWIS and MARILYN LEWIS,  
individually and as representatives of all  
persons similarly situated,

Plaintiffs - Petitioners,

v.

HARTFORD CASUALTY INSURANCE  
COMPANY; et al.,

Defendants - Respondents.

No. 15-80130

D.C. No. 3:15-cv-05275-RBL  
Western District of Washington,  
Tacoma

ORDER

Before: GOULD and WATFORD, Circuit Judges.

The petition for permission to appeal pursuant to 28 U.S.C. § 1453(c) is denied. *See Coleman v. Estes Express Lines, Inc.*, 627 F.3d 1096, 1100 (9th Cir. 2010) (per curiam).

SLL/MOATT

The Honorable RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DANIEL DAWSEY, individually and as the  
representative of all persons similarly situated;

Plaintiff,

v.

THE TRAVELERS INDEMNITY  
COMPANY;

Defendant.

NO. 3:15-cv-05188-RBL

FIRST AMENDED CLASS ACTION  
COMPLAINT

COMES NOW, the Plaintiff, DAN DAWSEY ("DAWSEY"), in the above-entitled matter and files this, his first Amended Class Action Complaint, as the proposed Class Representative of a Class to be composed of certain insureds of THE TRAVELERS INDEMNITY COMPANY (hereafter "TRAVELERS" or "Defendant") with policies issued in the State of Washington, and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION

1.1 This action seeks to recover damages suffered by Plaintiff and the Members of the Class, all TRAVELERS insureds within the State of Washington as a result of TRAVELERS breach of its policy of insurance.

1.2 TRAVELERS advertised, solicited, and sold automobile insurance policies

FIRST AMENDED  
CLASS ACTION COMPLAINT - 1

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1 providing Uninsured Motorist Property Damage Coverage (“UIM”) in the State of  
2 Washington. These policies, like the policy sold to DAWSEY, offered to pay for  
3 legally recoverable losses and damage to insured vehicles.

4 1.3 This coverage, found in the UIM endorsement, promises “we will pay  
5 compensatory damages which an ‘insured’ is legally entitled to recover from the  
6 owner of operator of an ‘underinsured motor vehicle’ because of: ... 2. ‘property  
7 damage’ cause by an accident.” Property damage is defined as “injury to or  
8 destruction of the property of an ‘insured’” Similar language was authoritatively  
9 construed by the Courts of Washington, first on March 10, 2010 by the Court of  
10 Appeals (*Moeller v. Farmers Ins. Co. of Wa*, 155 Wn.App. 133, 229 P.3d 857  
11 (Div. 2 2010), and then on December 22, 2011 by the Washington Supreme Court  
12 (*Moeller v. Farmers Ins. Co. of Wa.*, 173 Wn.2d 264, 267 P.3d 998 (2011), as  
13 providing coverage for “diminished value after a car is repaired.”

14 1.4 Plaintiff claims that when certain automobiles, those within the proposed Class,  
15 sustain damage to their structural systems and bodies, they cannot be repaired to  
16 their pre accident condition, and are as a result tangibly different than they were  
17 pre accident. This causes the vehicles to suffer a loss in value called “diminished  
18 value” at the time of the accident.

19 1.5 TRAVELERS’ policy language does not exclude diminished value from coverage.

20 1.6 Despite knowing that diminished value was a non excluded loss under the UIM  
21 Coverage, TRAVELERS did not inform its insureds regarding coverage for  
22 diminished value nor did it adjust their losses to include any losses due to  
23 diminished value. Instead, TRAVELERS continued with its practice of failing to  
24 disclose the loss or coverage, and failing to adjust losses to consider and include  
25 payment for diminished value.

26 1.7 On April 11, 2014, Mr. Dawsey was involved in an auto accident with his 2012

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 2

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1 BMW 335 while insured by TRAVELERS. The vehicle had approximately  
2 22,306 miles on it at the time of the accident. As shown by the repair estimate,  
3 the vehicle suffered structure/frame damage, and required paint and body work  
4 and the cost of repair was more than \$1,000.00. The claim was covered by  
5 TRAVELERS under Mr. Dawsey's UIM coverage (Coverage D3).

6 1.8 As a result of the damage suffered, and the injury to the vehicle in the accident,  
7 Mr. Dawsey's vehicle is worth less after it was repaired than it was before the  
8 accident. Mr. Dawsey's vehicle, due to the nature of its damage and its injury is  
9 tangibly, and identifiably, different after the accident and after the repairs,  
10 resulting in the loss in value. Since the areas of repaired damage, and the  
11 resulting differences in the vehicle from pre-loss condition, can be detectible in  
12 any later inspection, the vehicle is worth less (it has "diminished value") as a  
13 result of the accident, irrespective of any repairs that might or could be done to the  
14 vehicle.

15 1.9 Like other members of the proposed Class, when Mr. Dawsey presented his  
16 vehicle to TRAVELERS to have his loss adjusted and paid, TRAVELERS neither  
17 informed Mr. Dawsey of the availability of coverage for diminished value, nor did  
18 it adjust the loss to include diminished value. TRAVELERS instead simply had  
19 an estimate prepared for the cost of repair of the vehicle, and not the entire  
20 covered damages and loss incurred by Mr. Dawsey.

21 1.10 Unlike most putative class members, Mr. Dawsey knew about and requested DV  
22 from the TRAVELERS claims adjustor. In fact, he requested it twice from Randy  
23 Dreghorn. Mr. Dawsey was told on two occasions by Mr. Dreghorn someone  
24 would give him a call to discuss the DV claim because he did not handle DV  
25 claims. Mr. Dawsey never heard from anyone at TRAVELERS about his DV  
26 claim and it remains unadjusted and unpaid to this day.

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 3

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1.11 Plaintiff alleges that TRAVELERS' failure to pay for this type of loss under its Washington insurance policy's UIM PD coverage breached its contract, and by failing to adhere to the Washington Administrative Code ("WAC") regulations governing claims handling and disclosure, violated the Washington Consumer Protection Act, for which Plaintiff seeks compensatory damages, trebling of the damages, and the mandatory award of fees and costs of this suit available under the Washington Consumer Protection Act ("CPA").

## II. JURISDICTION AND VENUE

2.1 TRAVELERS transacts business in Pierce County, Washington. Mr. Dawsey is a citizen of Washington. All members of the proposed Class are insured under policies issued in and for the State of Washington for vehicles registered in the State of Washington, and as a result nearly all are Washington residents and citizens.

2.4 Jurisdiction is afforded under the Class Action Fairness Act of 2005 ("CAFA").

## III. THE PARTIES

3.1 Plaintiff, Daniel Dawsey ("Mr. Dawsey") is an adult citizen who resides in the State of Washington. Mr. Dawsey was insured under a policy of insurance issued by TRAVELERS. That policy provided coverage for UIM losses.

3.2 What is today TRAVELERS was founded in 1864 as The Travelers Insurance Company. On April 1, 2004 The Travelers Insurance Company merged with St. Paul Fire and Marine Insurance Company to become St. Paul Travelers Companies, Inc. In 2007, the company changed its name to The Travelers Companies, Inc. TRAVELERS is headquartered in New York City with significant operations in St. Paul, Minnesota and Hartford, Connecticut. TRAVELERS does business throughout the state of Washington.

FIRST AMENDED  
CLASS ACTION COMPLAINT - 4

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IV. COMMON COURSE OF CONDUCT BY TRAVELERS

- 4.1 TRAVELERS solicits and advertises consumers to purchase UIM coverage for their vehicles from TRAVELERS.
- 4.2 The policy that TRAVELERS has used since December 2004 promises that TRAVELERS will: “will pay compensatory damages which an ‘insured’ is legally entitled to recover from the owner of operator of an ‘underinsured motor vehicle’ because of: ... 2. ‘property damage’ cause by an accident.” And further defines ‘property damage’ as “injury to or destruction of the property of an ‘insured.’” This coverage clauses covers any remaining injury due to diminished value.
- 4.3 Despite having not excluded diminished value as a loss, rather than informing members of the potential Class about the coverage provided by their policies and adjusting the loss, TRAVELERS failed to disclose pertinent coverages and benefits and did not adjust claims to address the injury to property which results from diminished value under the UIM coverage.
- 4.4 Despite knowing its obligations and duties and obligations to its insureds, TRAVELERS has undertaken a course of conduct designed to limit payments for diminished value by failing to disclose and adjust the loss, while instituting no company policies and procedures to pay for damages which it knows it is required to pay to many of its policyholders.

V. CLASS ACTION ALLEGATIONS

- 5.1 This action is brought as a class action under FRCP 23. TRAVELERS’ conduct has been systematic and continuous and has affected large numbers of TRAVELERS policy holders (estimated to total around 900 claims) over time. Plaintiff brings this class action to secure redress for TRAVELERS’ uniform and common practice of adjusting vehicle losses so that TRAVELERS fails to restore them to their pre loss condition, including value, by leaving the vehicles with the

FIRST AMENDED  
CLASS ACTION COMPLAINT - 5

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1 unavoidable tangible and detectable differences after repair. TRAVELERS  
2 further uniformly has failed to inform its policyholders of their loss, and pertinent  
3 benefits and coverages under the policy while failing to fully adjust their loss.

4 TRAVELERS' conduct has been uniform throughout the Class Period.

5 5.2 All members of the proposed Class have fully complied with all pertinent policy  
6 provisions to receive payment under their policies from TRAVELERS.

7 TRAVELERS has found the UIM coverage to apply to each member of the  
8 proposed Class's accident, and found the requirements for coverage to apply to  
9 have been fulfilled. Each member of the proposed Class has presented their  
10 vehicle for inspection by TRAVELERS or its agents to have the loss fully  
11 adjusted, and TRAVELERS or their authorized agent has inspected the vehicle.  
12 No further performance is required by any members of the proposed Class to  
13 secure all available coverages and benefits provided by the TRAVELERS policy.

14 5.3 Plaintiff seeks certification of the following Class:

15 All TRAVELERS insureds with Washington policies issued in  
16 Washington State, where the insured's vehicle's damages were  
17 covered under the UIM PD coverages, and

- 18 1. The repair estimates on the vehicle (including any supplements) totaled at  
19 least \$1,000; and
- 20 2. The vehicle was no more than six years old (model year plus five years)  
21 and had less than 90,000 miles on it at the time of the accident; and
- 22 3. The vehicle suffered structural (frame) damage and/or deformed sheet  
23 metal and/or required body or paint work.

24 5.4 Excluded from the Class are (a) claims involving leased vehicles or total losses,  
25 (b) employees of TRAVELERS, © the assigned judge, the judge's staff and  
26 family, and (d) accidents occurring six years before the filing of this Complaint.

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 6

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1           5.5    Membership in the Class is so numerous as to make it impractical to bring all  
2                    Class members before the Court. The exact number of Class members is  
3                    unknown, but can be readily determined from the records maintained by  
4                    TRAVELERS, and is estimated to number around 900 claims.

5           5.6    The named Plaintiff is typical of members of the Class. He purchased a  
6                    TRAVELERS automotive policy, paid his premiums, and made a claim for loss  
7                    when his insured automobile was damaged in an accident. Plaintiff filed a claim,  
8                    and made his vehicle available to TRAVELERS for determination and payment of  
9                    his loss. TRAVELERS then failed to adjust the loss to include diminished value,  
10                  or to inform him of the existence of coverage for his diminished value loss. When  
11                  he requested DV, TRAVELERS ignored his requests and refused to pay the DV  
12                  he was owed.

13          5.7    There are numerous and substantial questions of law and fact common to all of the  
14                  members of the proposed Class which predominate over any individual issues.  
15                  Included within the common questions of law and fact are:

- 16               a)    Whether TRAVELERS is contractually obligated to provide payment for  
17                      diminished value to its insureds;  
18               b)    Whether Plaintiff and members of the proposed Class had any further  
19                      obligations before having their losses adjusted by TRAVELERS to include  
20                      diminished value;  
21               c)    Whether TRAVELERS breached its contracts of insurance with the Class  
22                      by failing to pay diminished value;  
23               d)    The measure of damages for diminished value for the Class and its  
24                      amount; and  
25               e)    Whether Class members vehicles were tangibly and demonstrably different  
26                      after an accident and repair compared to before the accident, or if only

27    FIRST AMENDED  
28    CLASS ACTION COMPLAINT - 7

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“intangible” differences remain after repair, such that they were “fully repaired to their pre-loss condition.”

f) Whether TRAVELERS’ failure to disclose to its insureds their entitlement to compensation for DV as a benefit/coverage under the insuring agreement, and TRAVELERS’ failure to adjust claims for DV violates the Washington Administrative Code and the Washington Consumer Protection Act; and

g) Whether treble damages should be awarded under the Washington Consumer Protection Act.

5.8 Plaintiff has no interests adverse to the interests of other members of the proposed Class, and will fairly and adequately protect the interests of the Class.

5.9 Plaintiff has retained the undersigned counsel who are experienced and competent in the prosecution of class actions and complex litigation and have extensive experience with litigation involving diminished value. These counsel have the resources and experience necessary to prosecute this case.

5.10 A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Absent a class action, due to the refusal of TRAVELERS to inform its insureds about diminished value, the Class members will continue to suffer damage and TRAVELERS’ conduct will proceed without effective remedy.

5.11 Individual members of the proposed Class have little interest or ability to prosecute an individual action due to the complexities of the issues involved, the costs of assembling proof of the amount of diminished value, the time required, and the relatively small, although significant (likely averaging around \$1,460.00 per accident) damages suffered by each member of the proposed Class.

5.12 This action will allow the orderly, fair, and expeditious administration of Class

FIRST AMENDED  
CLASS ACTION COMPLAINT - 8

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claims, economics of time, effort, and expense will be fostered, and uniformity of decisions will be ensured. As with prior diminished value cases in this country, collective adjudication will allow sufficient proof and expertise to be assembled to fairly value and prove the losses at issue.

5.13 This action will present no difficulties which would impede its management by this Court as a class action and a class action is the best available means by which Plaintiff and the Members of the proposed Class can seek redress for the harm caused to them by TRAVELERS.

## VI. PLAINTIFF'S CAUSES OF ACTION AGAINST TRAVELERS

### COUNT I BREACH OF CONTRACT

6.1 Plaintiff realleges the allegations contained in the previous paragraphs as if fully set forth herein.

6.2 Plaintiff and members of the proposed Class entered into contracts which were identical in material respects with TRAVELERS. They paid all required consideration in the form of premiums for the coverage afforded by the TRAVELERS policy. They complied with all conditions precedent under the TRAVELERS policies, presented their claims. As to each claim, before paying to repair the vehicle, TRAVELERS found coverage to exist and apply and all conditions precedent to payment to be satisfied.

6.3 The TRAVELERS policy covers diminished value, and does not exclude the loss. There is no exclusion or limitation for diminished value in the policy. As such TRAVELERS was obligated to cover losses for diminished value.

6.4 TRAVELERS breached the express provisions of the policy and its contract with Plaintiff and members of the Class by not restoring vehicles to their pre loss value and then not paying for the resulting diminished value on those vehicles (such as those within the Class) that had, or would have, tangible differences after repair.

FIRST AMENDED  
CLASS ACTION COMPLAINT - 9

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1           6.5    As a direct and foreseeable consequence of the foregoing, Plaintiff and the  
2                   members of the Class have been damaged by receiving less (in the form of the  
3                   difference in the pre accident value of the vehicle and its value as a vehicle  
4                   repaired to industry standards) than they would have received had TRAVELERS  
5                   paid the amounts Plaintiff and members of the Class has contracted for, in an  
6                   amount to be determined at trial.

7           COUNT II - VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT

8           6.6    Plaintiff realleges the allegations contained in previous paragraphs as if fully set  
9                   forth herein.

10          6.7    In addition to the acts and omissions alleged above, despite knowing that all  
11                   conditions precedent to Plaintiff's recovery had been performed or had occurred,  
12                   TRAVELERS has failed and refused to pay Plaintiffs in accordance with its  
13                   contractual obligations. TRAVELERS additionally failed to disclose pertinent  
14                   coverages and benefits and did not adjust claims to address the injury to property  
15                   which results from diminished value under the UIM coverage.

16          6.8    Because of TRAVELERS' acts and omissions and failure to restore the Plaintiffs  
17                   and the Class Member's, vehicles to their pre-accident value, and because of  
18                   TRAVELERS' failure to make prompt payment of the amount of such damages,  
19                   TRAVELERS' acts/omissions were unlawful acts under Washington  
20                   Administrative Code Sections § 284-30-330 and § 284-30-350.

21          6.9    TRAVELERS' violations of the Washington Administrative Code regulations  
22                   constitute *per se* violations of Washington's Consumer Protection Act, RCW  
23                   19.86 *et seq.* Plaintiff and the members of the class have been damaged, as a  
24                   result, in an amount to be determined at trial, together with treble damages,  
25                   attorney's feed and costs of suit.

26  
27           FIRST AMENDED  
28           CLASS ACTION COMPLAINT - 10

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VI. PRAYER FOR RELIEF

7.1 Plaintiff and the members of the proposed Class have been injured as a result of TRAVELERS' wrongful conduct as described above. As a result, Plaintiff and the members of the proposed Class are entitled to and pray for the following relief:

- a. Judgment for the difference between the insured vehicle's pre loss value and its projected market value as a repaired vehicle after the accident;
- b. Costs of suit;
- c. Treble damages and attorney's fees and costs as authorized by RCW 19.86.090; and
- d. For such other relief as deemed just and equitable to effectuate the Court's Orders and Judgment.

7.2 WHEREFORE, THE FORGOING BEING CONSIDERED, Plaintiff respectfully requests that the Court certify this case as a Class Action and that judgment be entered for the Plaintiff and members of the proposed Class against TRAVELERS for the damages described above, and for such other and further relief, at law and equity, to which he and the Class may be entitled.

DATED THIS 26<sup>th</sup> day of October, 2015.

Law Offices of STEPHEN M. HANSEN, P.S.

By:   
STEPHEN M. HANSEN WSBA #15642  
Of Attorneys for Plaintiff

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FIRST AMENDED  
CLASS ACTION COMPLAINT - 11

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**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 26<sup>th</sup> day of October, 2015, I electronically filed the above and foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to the following:

Marilee C. Erickson  
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DATED this 26<sup>th</sup> day of October, 2015, at Tacoma, Washington.

  
SARA B. WALKER, Legal Assistant

FIRST AMENDED  
CLASS ACTION COMPLAINT - 12

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The Honorable RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN and MARILYN LEWIS individually  
and as the representative of all persons  
similarly situated,

Plaintiffs,

v.

HARTFORD CASUALTY INSURANCE  
COMPANY, PROPERTY AND CASUALTY  
INSURANCE COMPANY OF HARTFORD,  
HARTFORD UNDERWRITERS  
INSURANCE COMPANY, TRUMBULL  
INSURANCE COMPANY, TWIN CITY  
FIRE INSURANCE COMPANY,  
HARTFORD INSURANCE COMPANY OF  
THE MIDWEST, HARTFORD ACCIDENT  
AND INDEMNITY COMPANY, and  
SENTINEL INSURANCE COMPANY  
LIMITED,

Defendants.

NO. 3:15-cv-05275-RBL

FIRST AMENDED CLASS ACTION  
COMPLAINT

COMES NOW, JOHN and MARILYN LEWIS, (the "Lewises"), Plaintiffs in the above-  
named cause, and file this, their First Amended Original Class Action Complaint, as the  
proposed Class Representatives of a Class to be comprised of certain insureds of HARTFORD  
CASUALTY INSURANCE COMPANY, PROPERTY AND CASUALTY INSURANCE  
COMPANY OF HARTFORD, HARTFORD UNDERWRITERS INSURANCE COMPANY,  
TRUMBULL INSURANCE COMPANY, TWIN CITY FIRE INSURANCE COMPANY,

FIRST AMENDED  
CLASS ACTION COMPLAINT - 1

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HARTFORD INSURANCE COMPANY OF THE MIDWEST, HARTFORD ACCIDENT AND INDEMNITY COMPANY, and SENTINEL INSURANCE COMPANY LIMITED, (hereafter collectively "Hartford" or "Defendants") with policies issued in the State of Washington, and in support thereof alleges as follows:

#### I. INTRODUCTION

- 1.1 This action seeks to recover the actual damages suffered by the Lewises and the members of the Class, all Hartford insureds within the State of Washington, as a result of Hartford's breach of its standard form policy of insurance, and its failure to disclose and properly adjust their losses, necessitating this suit.
- 1.2 Hartford advertised, solicited, and sold automobile insurance policies providing Uninsured Motorist ("UIM") coverage in the State of Washington. These policies, identical to the policy sold to Plaintiffs, offered to pay for legally recoverable losses and damage to insured vehicles under the UIM Coverage, which includes any loss in the vehicle's market value after repair. See WPI 30.12.
- 1.3 The policies promise as follows "[W]e will pay compensatory damages which an insured is legally entitled to recover from the owner or operation of an underinsured motor vehicle because of:... (2). Property damage caused by an accident". The policy further states that: "'Property damage' as used in this Part C means injury to or destruction of the property of an insured." This language, found in Policy Form 8546 has been used unchanged by Hartford since 2004 and applies to all those in the proposed Class.
- 1.4 Substantially similar language has been authoritatively construed by the Courts of Washington, first on March 10, 2010 by the Court of Appeal (*Moeller v. Farmers Ins. Co. of Wa*, 155 Wn.App. 133, 229 P.3d 857 (Div. 2 2010)), and then on December 22, 2011 by the Washington Supreme Court (*Moeller v. Farmers Ins. Co. of Wa.*, 173 Wn.2d 264, 267 P.3d 998 (2011)), as providing coverage for

FIRST AMENDED  
CLASS ACTION COMPLAINT - 2

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"diminished value after a car is repaired" and diminished value is owed under Hartford's policy.

1.5 Plaintiffs claim that when certain automobiles, those within the proposed Class, sustain damage to their structural systems and bodies, they cannot be fully repaired to their pre-accident condition, and are as a result tangibly different than they were pre-accident. This causes the vehicles to suffer a loss in value called "diminished value" at the time of the accident.

1.6 While it does exclude diminished value under the Comprehensive and Collision sections (part D) of the policy - which are not applicable to the proposed Class - Hartford's policy language does not exclude diminished value from coverage under UIM (part C). Hartford has admitted that there is coverage and no exclusion, and therefore that "Diminution in value is potentially recoverable as an element of damages in a UMPD claim, if proven."

1.7 Despite knowing that diminished value was a non excluded loss covered under the policies UIM coverage, Hartford did not adjust Plaintiffs' or members of the proposed Class's losses to include losses due to diminished value. Instead, Hartford continued with its common practice of failing to disclose the loss, coverage, or its policies regarding adjusting and paying diminished value, and failed to adjust losses to consider and include payment for diminished value.

1.8 On June 15, 2014, Plaintiffs' 2010 Lexis IS 250C was involved in a hit and run accident. Plaintiffs' car was parked at Cascade Locks while they were away on a cruise ship. When they returned they saw that their car had been the subject of a hit and run accident. The rear of the car had been damaged.

1.9 Plaintiffs proceeded to recover the damages to their vehicle by filing a claim with Hartford. Hartford investigated, and (as with all others in the proposed Class) determined the loss to be covered under Plaintiffs' UIM Property Damage

FIRST AMENDED  
CLASS ACTION COMPLAINT - 3

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coverage.

1.10 Plaintiffs' 2010 Lexus IS 250C, two door convertible, was purchased new in 2010, the vehicle cost around \$50,000.00. Prior to this loss, it had not been involved in any prior accidents. At the time the vehicle was estimated for repair, immediately after the accident, it had 19,908 miles. The vehicle required over \$4,800.00 in repair work, including, but not limited to, repair and refinish (paint) work on the Right Rocker Panel, Right Door, luggage (trunk) lead, rear body panel, rear bumper cover, and repair, paint, and structural work on the Right Quarter Panel. As a result of the damage, including structural damage suffered, and the injury to the vehicle in the accident, and the inability to fully restore it to its pre-loss condition, Plaintiffs' vehicle is worth less after the accident than it was before the accident, irrespective of repair. The Lewises' vehicle, due to the nature of its damage, and that it was tangibly, and identifiably different after the accident and after the repairs, can't be fully restored to its pre-loss value. Since the areas of, and fact of repaired damage can be detected by knowledgeable buyers, knowledgeable buyers know that after the accident the vehicle lacks the attributes of an undamaged vehicle, and the vehicle is worth less (it has "diminished value") as a result of the accident, irrespective of any repairs that might, could, or were done to the vehicle.

1.11 Like other members of the proposed Class, Plaintiffs presented their vehicle to Hartford to have their loss adjusted and paid. Despite Hartford determined the loss was covered under the standard policy's UIM coverage, Hartford did not adjust the loss to include diminished value. Hartford instead simply had an estimate prepared for the cost of repair of the vehicle, and not the entire covered damages and loss incurred by Plaintiffs.

1.12 Plaintiffs though (unlike most members of the proposed Class) knew about

FIRST AMENDED  
CLASS ACTION COMPLAINT - 4

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1 diminished value, and demanded it from Hartford, providing an estimate of their  
2 losses from an independent adjuster. Although, Plaintiffs took appropriate  
3 measures to receive compensation from Hartford for the damages they incurred,  
4 Hartford continuously sought to deny Plaintiffs coverage for diminution of value  
5 damages. First, Hartford claimed that Plaintiffs were not owed diminution of  
6 value under the policy because Plaintiffs rejected the Underinsured Motorist  
7 Property Damage coverage in 2004. However, the insurance application bore out  
8 that in fact Plaintiffs did not reject Underinsured Motorist Property Damage  
9 coverage.

10 1.13 When an insured fails to accept or reject Underinsured Motorist Property  
11 Damages coverage the law finds in favor of the insured. In Washington, insurers  
12 must provide UIM coverage and must offer UIM coverage limits equal to the  
13 insured's liability coverage limits unless the coverage or the liability coverage  
14 limits are specifically rejected. RCW 48.22.030(2)-(3). Insureds may reject UIM  
15 coverage but the rejection must be in writing to be effective. RCW 48.22.030(4).  
16 Under these provisions, "UIM coverage becomes part of [all] automobile liability  
17 coverage by operation of law unless the insured party in writing agrees to a waiver  
18 or rejection." *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d  
19 1298 (1993). Any written rejection of coverage under RCW 48.22.030(4) "must  
20 be specific and unequivocal." *Cochran v. Great W. Cas. Co.*, 116 Wn.App. 636,  
21 642, 67 P.3d 1123 (2003); *Galbraith v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 78  
22 Wn.App. 526, 532, 897 P.2d 417 (1995) and *Weir v. Am. Motorists Ins. Co.*, 63  
23 Wn.App. 187, 190, 816 P.2d 1278 (1991).

24 1.14 Plaintiffs never signed a written rejection or waived their UIM coverage. Further,  
25 it is Plaintiffs' position that it was never their intent to reject Underinsured  
26 Motorist Property Damages coverage. In fact, Plaintiffs' insurance application

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 5

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1 indicates that Plaintiffs increased their Underinsured Motorist coverage from  
2 \$250,000/\$500,000 to /\$500,000/ \$1,000,000 by specifically handwriting in the  
3 increased coverage. As a result of having challenged the Hartford's claims, , on  
4 September 22, 2014, Plaintiffs received a letter stating that Hartford agreed with  
5 them that they in fact had UIM PD coverage, and backdated a change in their  
6 policy and added Underinsured Motorist Property Damages coverage to their  
7 policy beginning August 11, 2013.

8 1.15 After the policy was backdated by Hartford, and the dispute over UIM coverage  
9 was resolved in their favor, the Plaintiffs again demanded diminished value for  
10 their vehicle. Hartford provided no reason why it rejected their independent  
11 appraisal of the loss, and using a computer program formula, which was based  
12 upon a settlement negotiated over 15 years ago between a set of lawyers in  
13 Georgia (known as the "17.c" Formula), only offered to pay them \$905.00.  
14 Hartford provided no good faith explanation or support for their estimated loss in  
15 market value, nor explained why Plaintiffs' figure did not more accurately reflect  
16 the actual market value loss. The 17.c Formula has never been validated by any  
17 empirical analysis or data to support the results it produces. Plaintiffs rejected  
18 Hartford's offer as woefully inadequate and proceeded to litigation. To date,  
19 Hartford has failed to fairly and adequately compensate Plaintiffs for their  
20 diminution of value damages.

21 1.16 Plaintiffs allege that Hartford's failure to pay for this type of loss under its  
22 standard Washington insurance policy's UIM coverage breached its standard  
23 contract with its policyholders.

24 1.17 Plaintiff further alleges that Hartford's failure to pay for this type of loss under its  
25 Washington insurance policy's UIM PD coverage breached its contract, and by  
26 failing to adhere to the Washington Administrative Code ("WAC") regulations

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 6

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governing claims handling and disclosure, violated the Washington Consumer Protection Act, for which Plaintiffs seek compensatory damages, trebling of the damages, and the mandatory award of fees and costs of this suit available under the Washington Consumer Protection Act ("CPA").

## II. JURISDICTION AND VENUE

2.1 Hartford transacts business in Pierce County, Washington. Plaintiffs are citizens of Washington. Plaintiffs, John and Marilyn Lewis are adult citizens of Washington. All members of the proposed Class are insured under policies issued in and for the State of Washington for vehicles registered in the State of Washington, and as a result nearly all are Washington residents and citizens.

2.2 Jurisdiction is afforded under the Class Action Fairness Act of 2005 ("CAFA").

## III. THE PARTIES

3.1 Plaintiffs, John and Marilyn Lewis ("Plaintiffs") are adult citizens of Washington.

3.2 Hartford Casualty Insurance Company is a corporation headquartered in Connecticut, and domiciled in the State of Indiana. It does business, and issues policies with UIM coverage throughout the State of Washington.

3.3 Property and Casualty Insurance Company of Hartford is a corporation headquartered in Connecticut, and domiciled in the State of Indiana. It does business, and issues policies with UIM coverage throughout the State of Washington.

3.4 Hartford Underwriters Insurance Company is a corporation headquartered and domiciled in Connecticut. It does business, and issues policies with UIM coverage throughout the State of Washington.

3.6 Trumbull Insurance Company is a corporation headquartered and domiciled in Connecticut. It does business, and issues policies with UIM coverage throughout the State of Washington.

FIRST AMENDED  
CLASS ACTION COMPLAINT - 7

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1           3.7    Twin City Fire Insurance Company is a corporation headquartered in Connecticut,  
2                   and domiciled in the State of Indiana. It does business, and issues policies with  
3                   UIM coverage throughout the State of Washington.

4           3.8    Hartford Insurance Company of the Midwest is a corporation headquartered in  
5                   Connecticut, and domiciled in the State of Indiana. It does business, and issues  
6                   policies with UIM coverage throughout the State of Washington.

7           3.9    Hartford Accident and Indemnity Company is a corporation headquartered and  
8                   domiciled in Connecticut. It does business, and issues policies with UIM coverage  
9                   throughout the State of Washington.

10          3.10   Sentinel Insurance Company Limited is a corporation headquartered and  
11                   domiciled in Connecticut. It does business, and issues policies with UIM coverage  
12                   throughout the State of Washington.

13          3.11   When claims were made under any Hartford first party automobile policy,  
14                   including those issued by all eight Hartford entities listed in paragraphs 3.1 - 3.10,  
15                   those claims are handled by a single claims staff, under a single set of policies,  
16                   employed by the same company, under a set of policies and procedures which are  
17                   established by Hartford, regardless of the issuing entity. All eight issuing entities  
18                   are one common company, and are treated as such by the National Association of  
19                   Insurance Commissioners. As such, for purposes of their interactions with the  
20                   members of the proposed Class, the eight Hartford entities are juridically linked,  
21                   allowing Plaintiffs to represent insureds whose policies were issued by juridically  
22                   linked companies, and who were impacted by the same common pattern and  
23                   practice. As it relates to the events and issues at hand, the eight Hartford entities  
24                   are one and the same and are agents for and alter egos of each other through  
25                   Hartford which provides all staff, and sets all policies, and handles all claims for  
26                   all eight entities.

27    FIRST AMENDED  
28    CLASS ACTION COMPLAINT - 8

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IV. COMMON COURSE OF CONDUCT BY HARTFORD

- 4.1 Hartford solicits and advertises consumers to purchase UIM coverage for their vehicles from Hartford.
- 4.2 The policy that Hartford issued to all members of the proposed Class promised as follows "[W]e will pay compensatory damages which an insured is legally entitled to recover from the owner or operation of an underinsured motor vehicle because of:... (2). Property damage caused by an accident". The policy further states that: "Property damage' as used in this Part C means injury to or destruction of the property of an insured."
- 4.3 The language in the policies falling within the Class has been authoritatively construed in *Moeller v. Farmers* as providing diminished value coverage. Hartford has further admitted diminished value is a covered, non-excluded loss under the UIM section of its policy. Despite having not excluded diminished value in the UIM portion of the policy as a loss, Hartford failed to adjust claims to address the damage which results from diminished value.
- 4.4 Despite acknowledging that Plaintiffs were covered under UIM in their September 22, 2014 letter, Hartford has further failed to fully compensate Plaintiffs for the loss to their vehicle. Further, Hartford has not made reasonable attempts to accurately determine the diminished value loss of Plaintiffs' vehicle. Hartford having not excluded diminished value as a loss, rather than informing members of the potential Class about the coverage provided by their policies and adjusting the loss, Hartford failed to disclose pertinent coverages and benefits and did not adjust claims to address the damages which results from diminished value.

V. CLASS ACTION ALLEGATIONS

- 5.1 This action is brought as a class action under FRCP 23. Hartford's conduct has been systematic and continuous and has affected large numbers of Hartford policy

FIRST AMENDED  
CLASS ACTION COMPLAINT - 9

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holders over time. Plaintiffs bring this class action to secure redress for Hartford's uniform and common practice of adjusting vehicle losses so that Hartford fails to fully restore them to their pre-loss condition, including value, by leaving the vehicles with unavoidable tangible and detectable differences after repair. Hartford further uniformly has failed to inform its policyholders of their diminished value loss, and pertinent benefits and coverages under the policy while failing to fully adjust their loss. Hartford's conduct has been uniform throughout the Class Period.

5.6 All members of the proposed Class have fully complied with all pertinent policy provisions to receive payment under their policies from Hartford. Hartford has found the UIM coverage to apply to each member of the proposed Class's accident, and Hartford has found the requirements for coverage to apply to have been fulfilled by the Class Members. Each member of the proposed Class has presented their vehicle for inspection by Hartford or its agents to have the loss fully adjusted, and Hartford or their authorized agent has inspected the vehicle and determined the areas of physical damage that it would pay to repair. No further performance is required by any members of the proposed Class to secure all available coverages and benefits provided by the Hartford's policy.

5.7 Plaintiffs seek certification of the following Class:

All Hartford insureds with Washington policies issued in Washington State, where the insured's vehicle's damages was covered under the UIM PD coverage, and

1. The repair estimates on the vehicle (including any supplements) totaled at least \$1,000; and
2. The vehicle was no more than six years old (model year plus five years) and had less than 90,000 miles on it at the time of the accident; and
3. The vehicle suffered structural (frame) damage and/or deformed sheet metal and/or required body or paint work.

FIRST AMENDED  
CLASS ACTION COMPLAINT - 10

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Excluded from the Class are (a) claims involving leased vehicles or total losses, (b) employees of Hartford, © the assigned judge, the judge's staff and family, and (d) accidents occurring six years before the filing of this Complaint.

5.8 Membership in the Class is so numerous as to make it impractical to bring all Class members before the Court. The exact number of Class members is unknown, but can be readily determined from the records maintained by Hartford as shown in, e.g. the *Moeller v. Farmers*, *Mansker v. Farmers*, and *Merrill v. PEMCO* cases. Plaintiffs believe there are hundreds of people in the Class, and that the Class will involve around 1540 Hartford claims.

5.9 Plaintiffs are typical of members of the Class. They purchased a Hartford automotive policy, paid premiums, and made a claim for loss when their insured automobile was damaged in an UIM accident. They filed a claim, and made their vehicle available to Hartford for determination and payment of their loss. Hartford then failed to adjust the loss to include diminished value, or to inform them of the existence of coverage for their diminished value loss. Then when the Plaintiffs demanded diminished value and provided an expert report to support their claim, Hartford responded with a bad faith offer that was far less than the market value loss of their vehicle. Their interests are identical to those of other unnamed members of the Class.

5.10 As in *Moeller v. Farmers*, where many common issues were resolved, there are numerous and substantial questions of law and fact common to all of the members of the proposed Class which predominate over any individual issues. Included within the common questions of law and fact are:

- (a) Whether Hartford is contractually obligated to provide payment for diminished value to its insureds;
- (b) Whether Plaintiffs and the members of the proposed Class had any further

FIRST AMENDED  
CLASS ACTION COMPLAINT - 11

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obligations before having their losses adjusted by Hartford to include diminished value;

© Whether Hartford breached its contracts of insurance with the Class and violated the CPA by failing to pay diminished value;

(d) The measure of damages for diminished value for the Class and its amount;

(e) Whether Class members vehicles were tangibly different after an accident and repair compared to before the accident, or if only "intangible" and invisible differences remain after repair such that they were "fully repaired to their pre-loss condition" and value;

(f) Whether Hartford's use of the 17.c Formula defrauded its insureds and violated Hartford's obligations under the Washington Administrative Code and the Washington Consumer Protection Act;

(g) Whether Hartford's failure to disclose to its insureds their entitlement to compensation for DV as a benefit/coverage under the insuring agreement, and Hartford's failure to adjust claims for DV violates the Washington Administrative Code and the Washington Consumer Protection Act; and

(h) Whether treble damages should be awarded under the Washington Consumer Protection Act.

5.11 Plaintiffs have no interests adverse to the interests of other members of the proposed Class, and will fairly and adequately protect the interests of the Class.

5.12 Plaintiffs have retained the undersigned counsel who are experienced and competent in the prosecution of class actions and complex litigation and have extensive experience with litigation involving diminished value. These counsel have the resources and experience necessary to prosecute this case.

5.13 A class action is superior to other available methods for the fair and efficient

FIRST AMENDED  
CLASS ACTION COMPLAINT - 12

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adjudication of this controversy. Absent a class action, due to the refusal of Hartford to inform its insureds about diminished value, the Class members will continue to suffer damage and Hartford's conduct will proceed without effective remedy.

5.14 Individual members of the proposed Class have little interest or ability to prosecute an individual action due to the complexities of the issues involved, the costs of assembling proof of the amount of diminished value, the time required, and the relatively small, although significant (likely averaging around \$1460 per accident) damages suffered by each member of the proposed Class.

5.15 This action will allow the orderly, fair, and expeditious administration of Class claims, economics of time, effort, and expense will be fostered, and uniformity of decisions will be ensured. As with prior diminished value cases in this country, collective adjudication will allow sufficient proof and expertise to be assembled to fairly value and prove the losses at issue.

5.16 This action will present no difficulties which would impede its management by this Court as a class action and a class action is the best available means by which Plaintiffs and the members of the proposed Class can seek redress for the harm caused to them by Hartford.

## VI. PLAINTIFFS' CAUSES OF ACTION AGAINST HARTFORD

### COUNT 1 - BREACH OF CONTRACT

6.1 Plaintiffs reallege the allegations contained in the previous paragraphs as if fully set forth therein.

6.2 Plaintiffs and members of the proposed Class entered into contracts which were identical in all material respects with Hartford. They paid all required consideration in the form of premium for the coverage afforded by the Hartford policy. They complied with all conditions precedent under the Hartford policies

FIRST AMENDED  
CLASS ACTION COMPLAINT - 13

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1 and presented their claims. As to each claim, before paying to repair the vehicle,  
2 Hartford found coverage to exist and apply and all conditions precedent to  
3 payment to be satisfied.

4 6.3 The UIM coverage in Hartford policy covers diminished value, and does not  
5 exclude the loss. There is no exclusion or limitation for diminished value in the  
6 UIM section of the policy. There is no exclusion or limitation for diminished  
7 value in the policy, except the one added to the Collision and Comprehensive  
8 portion of the policy. This does not apply to the UIM coverage or any members of  
9 the proposed Class. As such, Hartford was obligated to cover and pay for the  
10 losses for the diminished value. Furthermore, "UIM coverage becomes part of  
11 [all] automobile liability coverage by operation of law unless the insured party in  
12 writing agrees to a waiver or rejection." *Clements*, 121 Wn.2d at 249. Plaintiffs at  
13 no time agreed in writing to reject Underinsured Motorist Property Damages  
14 coverage.

15 6.4 Hartford breached the express provisions of the policy and its contract with  
16 Plaintiffs and members of the Class by not restoring vehicles, for not paying for  
17 the resulting diminished value on those vehicles (such as those within the Class)  
18 that had, or would have, tangible differences after repair.

19 6.5 As a direct and foreseeable consequence of the foregoing, Plaintiffs and the  
20 members of the Class have been damaged by receiving less (in the form of the  
21 difference in the pre-accident value of the vehicle and its value as a vehicle  
22 repaired to industry standards) than they would have received had Hartford paid  
23 the amounts Plaintiffs and members of the Class have contracted for, in an  
24 amount to be determined at trial.

25 COUNT II - VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT

26 6.6 Plaintiffs reallege the allegations contained in previous paragraphs as if fully set

27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 14

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1 and

2 d. For such other relief as is deemed just and equitable and is necessary to  
3 effectuate the Court's Orders and Judgment.

4 7.2 WHEREFORE, THE FORGOING BEING CONSIDERED, Plaintiffs respectfully  
5 request that the Court certify this case as a Class Action and that judgment be  
6 entered for the Plaintiffs and members of the proposed Class against Hartford for  
7 the damages described above, for the attorney's fees described above, and for any  
8 necessary orders to effectuate this Court's Judgment.

9 DATED this 26<sup>th</sup> day of October, 2015.

10 Law Offices of STEPHEN M. HANSEN, P.S.

11 

12 STEPHEN M. HANSEN, WSBA # 15642  
13 Of Attorneys for Plaintiffs

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27 FIRST AMENDED  
28 CLASS ACTION COMPLAINT - 16

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**CERTIFICATE OF SERVICE**

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 26<sup>th</sup> day of October 2015, I electronically filed the above and foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to the following:

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DATED this 26<sup>th</sup> day of October, 2015, at Tacoma, Washington.

  
SARA B. WALKER, Legal Assistant

FIRST AMENDED  
CLASS ACTION COMPLAINT - 17

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